Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

CAPTAIN DARRELL G. OBER

Petitioner

v.

PAUL EVANKO, THOMAS COURY, JOSEPH WESTCOTT, AND HAWTHORNE CONLEY

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTORARI

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QUESTIONS PRESENTED

1.) Does the Third Circuit Opinion violate its own law, and the holdings of this Court, that protect a public employees' right to speak out on matters of public concern?

2.) Does the Third Circuit violate the meaning and purpose of the First Amendment by elevating a police officer's duty to his leader above his responsibility of the law?

3.) If a police officer does go outside his immediate chain of command to seek advice from high ranking superior officer, is his speech unprotected where he is ordered to maintain strict confidentiality by that officer, and virtually no workplace disruption ever occurs?

PARTIES TO THE PROCEEDINGS

The petitioner is Captain Darrell G. Ober
The respondents are Paul Evanko, Thomas Coury, Joseph Westcott, and Hawthorne Conley

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OPINIONS BELOW

The decision is filed at No. 02-3725 in the United States Court of Appeals for the Third Circuit. It was filed on October 21, 2003. The decision of the District Court was also not reported, and is also reprinted in the Appendix hereto. A petition for rehearing en banc before the Third Circuit Court of Appeals was denied on November 13, 2003.

CONSTITUTIONAL PROVISIONS INVOLVED

The 1st Amendment to the Constitution of the United States is directly implicated in this case and reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances".

STATEMENT OF THE CASE

The underlying case began as a First Amendment civil rights action brought by Petitioner, Pennsylvania State Police Captain Darrell Ober to redress retaliation in the form of egregious, adverse employment actions. Captain Ober was ordered, as a Captain, to serve in a Lieutenant's position. He was the only officer in the entire 95 year history of the Pennsylvania State Police to suffer this humiliating and degrading experience. In violation of PSP regulations, he was summarily transferred over 210 miles from his home and taken off the most prestigious assignment in the agency for no plain or just reason. Only the intervention of Pennsylvania's Commonwealth Court prevented the unlawful transfer, a gross violation of his rights. He was also the victim of a constructive demotion, was subjected to unlawful investigations conducted in violation of PSP regulations, was denied or removed from career enhancing transfers, assignments, promotions, and educational opportunities, and was regularly intimidated and defamed, all at the direct behest of the Pennsylvania State Police Commissioner and a number of his top assistants. This all happened because Ober did not inform these leaders that they were targets and, or, potential targets, of an FBI corruption probe. Ober acted on the direct order of a Deputy Commissioner (Lt. Col. Hickes) who ordered him to maintain confidentiality and report only to him. Colonel Evanko, the PSP Commissioner himself, admitted in his deposition that the Hickes order was a lawful order and one Ober was duty bound to obey. Ober had sought the advice of this particular deputy commissioner because Ober knew that this person could not possibly have been

involved in the sale of PSP academy appointments based upon Hickes' assignments and work history. Furthermore, Ober could not inform his immediate supervisor Hawthorne Conley who was changing duty stations and had not yet reported to his new assignment. On top of that Conley was potentially under suspicion because he knew the state legislators involved and was the immediate commander of the state trooper that had already been clearly identified as a lawbreaker. Regardless, Ober had no way of knowing that Hickes and Evanko were involved in some sort of political competition in the governor's office. However, the Third Circuit panel found that Ober's speech was not protected, in derogation of the established law clearly set down by this court, and the panel also directly violated opinions laid down by the Third Circuit itself, some of which were written by members of the panel itself. He did this by reasoning that Ober had somehow violated his chain of command. The Third Circuit panel thus placed a police officers duty to fastidiously and strictly report only to his immediate superiors in his chain of command regardless of whether they were involved in criminal wrongdoing or under investigation, even if it means compromising a public corruption investigation. Thus the panel held that Ober was in violation of his duty as a police officer, and was not engaged in protected speech, when he followed the lawful order of a Deputy Commissioner of the Pennsylvania State Police he had properly consulted for advice, and did not warn his superiors, who were directly implicated as targets, or potential targets, of an FBI public corruption probe, even though, if he had told them, he would have been obstructing justice. The panel found that the loyalty owed to Ober's superior officers exceeded his First Amendment right not to inform a target or potential targets of an existing investigation, and did so even

though Ober had then been unexpectedly ordered not to disclose the investigation until the FBI had finished its work. According to the Third Circuit panel a police officer who goes to a Deputy Commissioner (who contrary to the panel's implied finding most certainly was in Ober's chain of command) for advice in not engaging in protected speech.

But when Ober informed the Commissioner, Paul Evanko, Commissioner Evanko flew into a rage, threatened Ober, and made good on his threats. So Ober, even though he had a spotless 20 year history of exceptional performance, was made to suffer the destruction of his exemplary career, because he did not disclose an FBI public corruption investigation in which his superiors were potential targets. According to the defendant/respondent Lt. Col. Coury, Ober violated nothing but what Lt. Col. Corey called a matter of "principle of culture". Precisely what the Third Circuit Court of Appeals panel elevated above the importance of a public employees rights under the First Amendment was, simply put, this matter of "principle of culture" and nothing more. And although everything done to Ober was done improperly, and not coincidentally no attempt was ever made to formally discipline Ober, the Third Circuit panel found that Ober's speech was not protected speech because he violated an "established chain of command", which is a mere euphemism for the "principle of culture" referred to by Lt. Col. Coury, by not telling his superiors that they were likely targets of an FBI probe. Regardless, aside from the fact that there is no such "established chain of command" implicated in what Ober did or did not do, i.e. any PSP officer has the right, and not infrequently they do, go to the Commissioner or the Deputy Commissioner's with matters they deem as of the utmost importance to the agency. This is commonly and openly called, the "open-

door policy" in the Pennsylvania State Police. The only meaning that can be taken from the opinion under appeal is that a police officer's duty to his leaders exceeds his responsibility to the public and his duty to obey the law, in other words a police officer has a duty to tip his superiors off that they are being investigated for public corruption, and if it is discovered by those leaders later that he did not do so, his career can be destroyed and he has no protection whatsoever under the law, even if another law enforcement agency like the FBI comes to him for information about how a particular police force is organized and expects confidentiality. The panel found that Ober violated regulations, although the regulations clearly do not either say, or stand for, what the panel says they say, something even admitted to by the opposition below, they would be unlawful in any event under such circumstances if in fact they did obligate an officer to tell his superiors that a legitimate law enforcement agency was investigating corruption by his superiors. In plain terms, such conduct, or such a regulation would enhance and promote the obstruction of justice, seeking to make police forces impervious to outside investigations. Even the defendants below admitted that a police officer cannot and should not ever advise a target, or potential target, that they might be under investigation. This evidence, expressly admitted by every defendant below without exception, was ignored by the Third Circuit panel. The Third Circuit Court of Appeals panel which decided the matter below misapprehended not only the facts, which resulted in erroneous deductions in their opinion, but far more onerously, the panel laid down a decision that places a police officer's duty and obligation to his leaders above his duty to obey the law and protect the public interest, and avoid the obstruction of justice, while permitting his superiors to destroy his career should he not demonstrate

blind loyalty to the leader. The substance and implications of the Third Circuit opinion under appeal here, poses the greatest threat to the internal security of the United States and to the meaning and application of the First Amendment than any other appellate court opinion in our nation's history. These may be tall words, but they are not an exaggeration.

This is a First Amendment civil rights case brought by a Pennsylvania State Police (PSP) Captain Ober. The Captain suffered countless, severe forms of retaliation and adverse employment actions at the hands of the respondents – that is, the respondents attempted to summarily transfer petitioner over 210 miles from his home; constructively demoted him; denied him numerous promotion, overtime, reimbursement and educational opportunities; without just cause subjected him to career destroying investigations; subjected him to an irrational and baseless series of vituperative personal attacks on his character; denied him requests for career enhancing transfers and assignments; discriminated against him by creating a pervasive atmosphere among State Police staff fostering retaliation, resentment, and officially sanctioned harassment him through petty humiliations, acts and threats of personnel actions, and outright ostracism; and unlawfully removed him from prestigious assignments.

The basis for the adverse actions taken against the petitioner are directly attributed to his role in a Federal Bureau of Investigation (FBI) probe of political corruption that involved local politicians, members of Pennsylvania's General Assembly, a Pennsylvania State Police Trooper, and potentially, members of Governor Office, and PSP Executive Officers to include the Commissioner.

The Court of Appeals held that within the meaning of the two-part balancing test established by

the United States Supreme Court in *Pickering v. Board of Education*. 391 U.S. 563 (1968) because Captain Ober bypassed the "established chain of command" and sought advice and guidance of a Lieutenant Colonel and not an immediate supervisor petitioner violated an established PSP regulation requiring PSP members to promptly report, to their superiors, any suspected wrongdoing by other members. The anomaly is apparent and obvious. Could the regulation ever seriously be taken to mean Ober should reveal a probe into his superiors themselves? The panel said yes. The Court of Appeals further applied *Azzaro v. County of Allegheny*, 110 F.3d 968, 980 (3d Cir.1997) (en banc) to conclude the balance should weigh in favor of the State Police where their interest in "effective and efficient provision of services" outweighed petitioner's interest in speaking on matters of public concern.

The petitioner, Captain Darrell G. Ober, is employed by the Pennsylvania State Police and has a spotless record encompassing over 20 years of service. On May 2, 1998, be assumed command of the Pennsylvania State Police (PSP) Internal Affairs Division (IAD). In September 1998, petitioner was contacted by the FBI regarding an active criminal investigation they were conducting into political corruption. An FBI confidential informant had reported that members of the "Governor's Office" and "high-ranking members of the PSP" might be involved in a bribery scheme that could compromise the State Police Cadet hiring process. The FBI requested that petitioner not divulge this information to potential targets including top-ranking PSP officials who might be within the scope of their probe.

Petitioner's immediate supervisor, newly-promoted Major Conley, had not yet reported to his duty station. Conflicts in duty schedules would ultimately

prevent petitioner and Major Conley from meeting for nearly two weeks after petitioner received the FBI report. Major Conley was formerly the Troop Commander of the exact area in Pennsylvania where the FBI political corruption probe originated and was being conducted and further he was personal friends with some of the officials mentioned.

Petitioner knew it was important not to compromise the FBI probe. He thought it was enough to seek the advice of a senior commander. Ober elected to seek the advice of a newly appointed Deputy Commissioner of Staff, Lieutenant Colonel Robert C. Hickes who could not have been involved in the sale of Academy appointments. Upon hearing petitioner's information, Hickes lawfully ordered petitioner to cooperate with the FBI, to keep Hickes informed, and not to report the probe to anyone else, including other members in petitioner's immediate chain of command which included Major Conley. Petitioner of course obeyed Hickes' order.

In early May 1999, the FBI concluded their investigation; the wrongdoing seemed limited to one PSP Trooper and one civilian; and it did not reach higher into the PSP hierarchy. FBI informant body wires made reference to the Governor's Office; a Lieutenant Colonel in the State Police; local politicians and members of Pennsylvania's General Assembly. Ironically, the Respondent's refused petitioner's discovery requests for full disclosure of the identity of all potential subjects, the scope of the probe, or copies of the investigative files. A previous investigation had strangely laid dormant for 2 years.

On May 12, 1999, Hickes and petitioner met with Commissioner Evanko and disclosed the existence of the FBI investigation. Upon hearing the news, Evanko exploded into a fit of rage and immediately

threatened to contact the Director of the FBI and have the involved FBI agents transferred. The next day Evanko telephoned the FBI. Prior to the criminal case being completed against the involved Trooper, the lead FBI investigator was transferred from the case and sent to a surveillance squad.

Despite knowing petitioner had not committed any wrongdoing; had not broken any laws; violated any regulations, practice, or custom of the State Police and against the advice of other senior command personnel including Lieutenant Colonel Thomas Coury, Evanko ordered an "administrative inquiry" into petitioner's handling of the FBI investigation. This marked the beginning of a relentless series of investigations, anti-personnel actions and acts of retaliation taken against the petitioner.

On May 13, 1999, Hickes, alarmed by Evanko's reaction, sought the input of the State Police Chief Counsel who agreed with the manner in which Hickes handled the information regarding the FBI corruption probe provided to him by petitioner.

In violation of State Police policy, the custom and practice of the agency and of petitioner's collective bargaining agreement, petitioner was never apprised of the results of Evanko's "star-chamber" administrative inquiry. Petitioner was never counseled, never issued an oral or written reprimand; never received a Supervisor's Notation, a negative comment on his annual performance evaluation and was never afforded any administrative due process rights. Most important, petitioner was never officially charged with violating any State Police rules or regulations and was never told that he did in fact violate any rule or regulation in the State Police. In fact, contrary to the Third Circuit panels' holding, the defendants admitted that Ober acted properly. They were angry they said, at Hickes.

When the respondents appealed the District Court's decision on the basis of qualified immunity, asserting that petitioner's conduct did not constitute speech and that petitioner's conduct did not constitute protected speech, they made a mere passing reference to the "effective and efficient provision of services", the respondents appeal argument consisted of the following three non-specific sentences:

"Even assuming Ober's conduct satisfies the speech requirement, the defendants interest in enforcing State Police regulations clearly outweighs Ober's interest in choosing which regulations he wished to follow. Order and morale are critical to successful police work, and the need to secure discipline, loyalty, respect, trust, obedience, morale, and public confidence are paramount concerns…The district court did not even consider the special concerns of a paramilitary organization such as the State Police". The Third Circuit panel took this point beyond any evidence to support it.

The factual record is devoid of any credible evidence that petitioner's actions in any way affected the respondents self-described "paramount concerns" of order, morale, discipline, loyalty, respect, trust, obedience, and public confidence of the State Police. In fact, the record and the testimony says the exact opposite. The Third Circuit never reconciled the most obvious and glaring contradiction of this case; the "paramount concerns" of the respondents have never been discussed with the petitioner; he was never appraised of the results of Evanko's inquiry; he was never admonished in any official manner; he was never counseled; he has never received a Supervisor's Notation; he has never received an oral or written reprimand; and he has never received a negative comment on his annual performance evaluation. Yet, the respondents acknowledge, "…the Commissioner is

ultimately responsible for the conduct of every member of the force". However, the Appellant Court never accounts for the contradiction in Evanko's dereliction of duty in his failure to address petitioner's alleged sins. It is simply not addressed, *Pickering v. Board of Education* not withstanding.

Nor did the Third Circuit ever reconcile over 50 misstatements of fact, fabrications, and misquoted regulations contained in the Appeal Brief of the respondents. Nor did they address the numerous examples of gross misconduct committed by the respondents and their attorneys. That misconduct included, perjury, suborning perjury, presenting false affidavits, violations of state and federal privacy laws, the intentional deceit and distortion of the factual record, that the District Court even commented on, and abuse of power to obstruct this litigation, obfuscation, permitting false testimony at depositions and misrepresented facts to opposing counsel and to the court, withholding of critical facts and documents and the intentional perversion of legal process. The Third Circuit ignored all of this.

The respondents falsely accused petitioner of violating numerous State Police regulations in their Appeal Brief. The Third Circuit was silent as to how it was able to deduce that petitioner violated FR 1-1.17 (B). The factual record is replete with evidence the respondents intentionally misrepresented the language of the regulation before the trial court. The Third Circuit missed the point of the regulations. Its meant to discourage "blue line" protectionism and was interpreted conversely (and incorrectly) by the Third Circuit The regulation was intentionally altered by respondents since it was first introduced into the record with their Motion to Dismiss on March 16, 2001.

The Court of Appeals reversed the District Court's judgment reasoning that when Ober went to Hickes he went outside his chain of command (Hickes is in his chain of command) and because he did so, he engaged in unprotected speech. By doing so, the Third Circuit put every law abiding police officer in America at risk for doing his or her job unless they are willing to obstruct justice out of loyalty to their leader.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit Opinion violates not only its own holdings, but the holdings of this Court that protect a public employee who speaks out on matters of public concern.

II. The Third Circuit opinion violates the meaning and purpose of the First Amendment by elevating a police officer's duty to his leader above his responsibility to the law.

III. A police officer who goes outside his immediate chain of command to seek advice from a high-ranking superior officer, is engaged in protected speech.

DISCUSSION

Petitioner begins this argument with a handicap. This court does not review the decisions of appellate courts that make factual errors. And petitioner does not, of course, seek a de novo review on that basis. However, the factual misrepresentations in the Third Circuit panel's opinion are so egregious that petitioner is duty bound to point them out. Those errors notwithstanding, the petitioner seeks review based upon the errors of law committed by the panel below. While

arguing those points of law, petitioner, who must argue from a perspective based upon the fact assumptions in the Third Circuit panel's opinion, wishes this Court to know, that he emphatically denies that there is any PSP regulation, custom, practice, or usage, nor any support thereof in the record, for the panel's conclusory deduction that Ober went outside some sort of "established chain of command" which he supposedly bypassed in October 5, 1998 when he went to a deputy commissioner of the PSP to seek advice, not only because, his incoming commander, the defendant Conley below, was not available and did not show up for two weeks, and also because Conley was quite suspect. Ober also knew that the deputy commissioner was the only high-ranking PSP official who could not have been involved in the corruption alleged. The panel opinion also fastidiously avoids accurately referring to the incredibly egregious adverse personnel actions petitioner suffered, clearly downplaying them.

The panel claims that Ober failed to engage in constitutionally protected speech because he did not go to his immediate commander Hawthorne Conley. Conley however was the immediate commander of Kip Stanton a primary suspect, and Conley was also not available. Worse yet, as indicated by the information filed by the PSP later, when Stanton was prosecuted, Stanton was to funnel money to "a public servant who was to exert his influence with the Pennsylvania State police on behalf of the actor". The state police operatives were never named, although they were called "higher-ups" and in one case a reference was made to a "Lt. Col" of which their were only 3, and people in the "governor's office". Conley not only knew, but had been encouraged to work with, as per PSP policy, the elected Pennsylvania State Representative named by the informant, an individual named Joseph Preston. The

FBI expected confidentiality, and Ober innocently and quite properly sought the advice of a deputy commissioner, who then ordered him to maintain strict confidentiality and report only to the deputy commissioner himself. There is no question, and all respondents agree, that Ober was duty bound to follow the deputy commissioner's order. Consequently Ober was never disciplined. The Third Circuit opinion holds that Ober's speech was unprotected merely because he went to a deputy PSP commissioner, who the panel erroneously found, was outside of his chain of command. Regardless, if that's so, then Ober of necessity violated the very regulation that the Third Circuit sites as authority for its holding. Interestingly, the testimony of the respondents themselves indicate their contrary understanding of what the regulation means, the panel's opinion notwithstanding. If Ober had strictly stayed in his chain of command he would have informed the targets of an FBI public corruption probe that they were the targets, and, or potential targets of a lawful and well justified investigation into the sale of PSP Academy positions. His only alternative would have been to remain silent. The Third Circuit opinion is totally silent as to whether Ober's speech would have been unprotected if he had simply remained silent and told no one. Yet even a casual student of the facts in this case cannot avoid the obvious, namely that Ober was punished, and suffered retaliation, not because he went outside his chain of command, but because he didn't tell the boss. Maintaining this fiction, and not considering the totality of the evidence of this case, to finally conclude that this matter is about Ober going outside the chain of command, a theorem not even pursued by the respondents below, leads to an anomaly at law i.e. that the First Amendment will protect little, if it will not protect a public employee maintaining the

confidentiality or integrity of a public corruption investigation by the FBI. Ober did maintain the confidentiality of the FBI probe, which is exactly what he and the FBI agents understood should be the case. Viewed in this light, the chain of command argument is a red herring. Needless to say, it is clear that the FBI would never have expected Ober to tip off the targets of their investigation, nor would they begrudge him seeking the advice of a superior officer he knew could not have been involved in the sale of Academy positions.

But the meaning of the Third Circuit panel's holding is clear. If you are a police officer, and you do not report your knowledge of a public corruption investigation into your superiors, to those same superiors, or, if you discuss knowledge of their unlawful behavior, seeking advice from someone you otherwise would have a right to seek advice from, then you can be subjected to career destroying adverse employment actions. You are not engaged in protected speech. You must fend for yourself, on your own, even though you privately sought the advice of the top leadership of your organization. If you report to anyone other than your immediate superior in your chain of command, even if he's a target, you are at risk because you are not engaged in protected speech. The panel's holding places the control of police operatives at every level in the United States in the self serving hands of their topmost superiors, even when those officials are under investigation to the detriment of the public interest in rooting out public corruption and in violation of existing First Amendment law.

The decision is in total contradiction of the Third Circuit holding in *Baldassare v. New Jersey, 250 F.3d 188, (3d. Cir. 1999).* And because there's absolutely no evidence or indication of any workplace disruption

whatsoever, at any time, the holding also contradicts the well-established law of *Pickering V. Board of Education, 391 U.S. 563 (1968).* Compare *Walker v. The City of Camden, docketed at No. 02-2442* United States Court of Appeals for the Third Circuit(opinion filed: January 30, 2003). The *Walker* case, just like *Ober*, is not reported even though both contain extremely broad and important holdings. The *Walker* case was decided just nine months before the matter under appeal. At page six of the slip opinion, the panel, which included a member of the panel which decided the Ober case, opined as follows:

> " As suggested above, despite both parties repeated references, both before the District Court and on appeal, to Walker's "speaking out," and "speaking out publicly" and "openly" in criticism of the administration, there's utterly no evidence that he did so and the parties conceded at oral argument that he did not. Indeed, the only person Walker spoke to about his concerns were his supervisors and other city officials -- privately.
>
> Because Walker's critical speech on issues of public concern was limited to in-house conversations primarily with his supervisors, that speech surely passes the balancing test and is protected. Indeed, appellees have not even suggested any legitimate interest in preventing the registration of internal complaints of commercial impropriety or corruption or racism such as Walker privately voiced here and there is no evidence of any impact on the administration's operations, much less any disruption from his speech.", emphasis added.

BEST AVA

And here what Ober did was far more commendable, he sought the advice of a deputy commissioner in the Pennsylvania State police.

The only difference between the ***Ober*** case and the ***Walker*** case, cited above, is the presence of the purported "chain of command regulation". The regulation, PSP Field Regulation 1.17 B, is as follows,

> "1.17 Reporting Of Information
>
> A.) Members shall report to their supervisor all information that comes to their attention concerning organized crime, racketeering, vice conditions or violations of any laws concerning such activities.
>
> B.) Members shall promptly report to their supervisor any information which comes to their attention and which tends to indicate that any other member or employee has violated the law rule, regulation or order.", and,

was designed to require members of the Pennsylvania State Police, to not cover up for, or protect, misconduct by other officers by requiring them to report it. It strains even the most liberal interpretation possible of the regulation to even remotely suggest that it was intended to require a police officer to betray the confidentiality of an investigation by the FBI into his superiors and reveal targets, or potential targets, of that investigation. Even more so, to imply that the regulation could be interpreted as a prohibition against any officer going to a deputy commissioner for advice on how to handle an important matter of public concern is patently unsupportable. Therefore, the only possible

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meaning that can be attributed to the panel decision under appeal, is that Ober suffered the retribution he did because he did not report the FBI probe to his immediate supervisor Conley, plainly a potential target, and of course, to the other potential targets above him.

Herein lies the ultimate danger in the opinion below. It catapults loyalty to the leader over the duty and obligation that a police officer has to obey the law, not obstruct justice, and exercise the integrity and sound judgment we expect of a police officer when confronted with a public corruption investigation which implicates his leaders. The opinion strips him of his First Amendment rights. This opinion advises a Pennsylvania State police officer who hears of a public corruption investigation from a bona fide law enforcement agency, into his superiors, to report it to them even when the investigators expect him not to. Ober's duty is to Evanko, not to the law, not to the public, and not to his oath of office under the order. Far worse, it says, that if our hypothetical officer has a private discussion with a superior officer he knows to be clean and unconnected with the wrongdoing , for the sole purpose of receiving his counsel, that he can suffer the most egregious of anti-personnel actions, without any protection. This opinion totally destroys any First Amendment protections that a police officer might have to report or discuss corruption outside of his chain of command, even if he is only seeking the advice from qualified superiors in his own organization. It effectively prevents him from seeking advice on how to prevent or avoid the disclosure of an investigation by a qualified law enforcement agency such as the FBI. The ultimate irony of the Third Circuit opinion is that the respondents never went as far, nor took the position on the

regulation, that the panel did. The ramifications of the underlying opinion are endless. The meaning and effects that the Third Circuit panel establishes in this case, though not the law in the US military, poses a danger even there for obvious reasons. Soldiers have a duty to report misconduct, and that includes going around their immediate commander, if necessary, not to protect wrongdoers. During oral argument, a member of the panel asked petitioner's counsel, who he knew to be a combat veteran of the Vietnam War, to analogize his experience with the circumstances Ober faced. If such a situation arose in the United States Army and Ober had tipped off his superiors, as the Third Circuit opinion would expect him to do, or had remained silent at his peril, as the Third Circuit opinion implies in its interpretation of Field regulation 1.17B, that soldier or officer would have been court-martialed. Nothing in the U.S. Army remotely suggests that any soldier has a blind loyalty to his leader. The PSP can now be expected to start disciplining officers, citing the Third Circuit opinion for disloyalty, and will undoubtedly dispense with the open-door policy now in place. Even the lawfully established roots of Title VII law which expressly empowers an employee to circumvent an abusive supervisor are threatened by this holding. Chain of command over everything.

CONCLUSION

Wherefore this court is respectfully requested to grant petitioner's writ. The issues raised by the Third Circuit opinion below are against the decisions of the Third Circuit itself and are in contradiction of established law and the holdings of this Court. Furthermore, the order and memorandum under ideal pose an imminent and ever present danger to the

fundamental meaning of the First Amendment to the U.S. Constitution and our way of life.

Respectfully Submitted,

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THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02-3725

DARRELL G. OBER

v.

PAUL J. EVANKO, MARK CAMPBELL, THOMAS COURY, JOSEPH WESTCOTT, HAWTHORNE CONLEY

Paul J. Evanko, Thomas Coury, Joseph Westcott and Hawthorne Conley, Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

District Judge: The Honorable William W. Caldwell (D.C. Civil Number 01-00084)

Submitted Under Third Circuit LAR 34.1(a) July 11, 2003

BEFORE: NYGAARD and SMITH, Circuit Judges & IRENAS, Senior District Judge.
(Opinion Filed: October 21, 2003)

OPINION OF THE COURT

*Honorable Joseph E. Irenas, Senior United States District Judge for the District of New Jersey, sitting by designation.

IRENAS, Senior District Judge:

I.

Appellee Darrell G. Ober ("Ober"), a police officer with the Pennsylvania State Police ("PSP"), sued Appellants, Paul Evanko, PSP Commissioner; Thomas Coury, PSP Deputy Commissioner; Hawthorne Conley, PSP Deputy Commissioner: Joseph Westcott, former PSP Deputy Commissioner: and Mark Campbell, former assistant chief of staff to former Pennsylvania Governor Thomas Ridge, in the United States District Court for the Middle District of Pennsylvania for civil rights violations under 42 U.S.C. § 1983. Ober alleges that Appellants wrongfully retaliated against him for exercising his First Amendment right to comment on matters of public concern when he discussed a police corruption investigation outside the chain of command. Appellants moved for summary judgment on qualified immunity grounds. The District Court denied Appellants' motion, finding that Appellants violated Ober's clearly established First Amendment rights and, thus, were not entitled to qualified immunity. Appellants argue, and we agree, that the District Court erroneously denied their motion for summary judgment because the District Court incorrectly found that Ober's communications outside the chain of command are

protected speech. Because Ober's speech is not protected, there is no need to decide whether Appellants are entitled to qualified immunity. Therefore, we will reverse the District Court's denial of Appellants' motion for summary judgment.

Because we write only for the District Court and the parties, who are familiar with the facts of this case, we recite only those facts relevant to the disposition of this appeal.

In late September or early October 1998, FBI Special Agent Ralph Kush ("Kush") approached Darrell Ober ("Ober" or "Appellee"), then Division Director for the Pennsylvania State Police Internal Affairs Division ("IAD"), Bureau of Professional Responsibility ("BPR"), to discuss an FBI investigation into police corruption. Kush told Ober that the FBI suspected Pennsylvania State Police Trooper Kipp Stanton ("Stanton") of taking bribes in return for rigging the cadet selection process and asked for Ober's help in gathering information. Kush did not tell Ober to keep the investigation secret, nor did he indicate that any of Ober's superiors were involved. Ober did not ask if anyone in his division or his superiors were suspected of wrongdoing.

On October 5, 1998, shortly after his conversation with Kush, Ober bypassed the established chain of command and spoke about the investigation with Lieutenant Colonel Robert Hickes ("Hickes"), Deputy Commissioner of Staff. Ober's direct supervisor at the time was Major Hawthorne Conley ("Conley"). Under State Police Field Regulation 1.17B, PSP members are required to "promptly report to their supervisors any information which comes to their attention and which tends to indicate that any other member or employe [sic] has violated any law, rule, regulation or order." Ober never discussed the

investigation or his conversations with Kush with Major Conley. Hickes told Ober not to tell anyone else about the investigation and to keep him updated.

Approximately seven months later, on May 12, 1999, Ober and Hickes finally informed PSP Commissioner Paul Evanko ("Evanko") about the FBI probe. At that point, the FBI had completed its investigation and determined that Stanton was the sole Trooper engaged in wrongdoing. Evanko subsequently conducted an administrative inquiry into Ober's and Hickes' conduct regarding the investigation, although neither Ober nor Hickes was disciplined.

Over the next several months Ober alleges that Appellants took numerous adverse actions against him in retaliation for his decision to circumvent the chain of command including removing Ober from volunteer positions, investigating his off-duty activities, denying him educational opportunities, assigning Ober to undesirable positions, and failing to promote him to the rank of major. None of these actions, however, affected Ober's rank, pay, benefits or status.

III.

The District Court exercised jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. We have jurisdiction under 28 U.S.C. § 1291 to review the District Court's denial of summary judgment. *See Behrens v. Pelletier*, 516 U.S. 299, 306 (1996) (noting that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291") (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). Our review is *de novo See Carrasca v. Pomeroy*, 313 F.3d 828, 832 (3d. Cir. 2002); *Baldassare v. New Jersey*, 250 F.3d 188, 192 n.1 (3d Cir. 2001); *Brown v. Armenti*, 247 F.3d 69, 72 (3d Cir. 2001); *Witkowski v. Welch*, 173 F.3d 192, 198 (3d. Cir. 1999).

In conducting our review, we view the facts in the light most favorable to the non-moving party. *Baldassare*, 250 F.3d at 191 n.1, 3. Therefore, in making a determination as to whether Appellants are entitled to qualified immunity, we will make an independent determination as to "whether the facts identified . . . constitute a violation of a clearly established constitutional right." *Atkinson v. Taylor*, 316 F.3d 257, 261 (3d Cir. 2003) (internal citation omitted).

A.

Qualified immunity shields "government officials performing discretionary functions . . . from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 614 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This doctrine protects defendants from "unwarranted liability" and the "unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit." *Wilson*, 526 U.S. at 609; *see also Seigert v. Gilley*, 500 U.S. 226, 232 (1990) (noting that determinations of qualified immunity "permit[] courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits"). We conduct a two-part inquiry to determine if a defendant is entitled to qualified immunity. First, we "determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *Siegert*, 500 U.S. at 232. If there is no constitutional right at issue, the inquiry ends. If, however, we find a constitutional right, we "proceed to determine whether that right was clearly established at the time of the

alleged violation." *Conn*, 526 U.S. 290. A clearly established right exists where "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "Deciding the constitutional question before addressing the qualified immunity question" not only provides a clear framework for the judiciary, but also "promotes clarity in the legal standards for official conduct." *Wilson*, 526 U.S. at 609. Therefore, we first must determine if Ober alleges a deprivation of an actual constitutional right. We find that he does not and, thus, we need not address the second prong of the inquiry.

B.

Ober claims that he was retaliated against for exercising a First Amendment right to bypass the chain of command when discussing a police corruption investigation. It is clear that "[p]ublic employee[s] [have] a constitutional right to speak out on matters of public concern without fear of retaliation." *Baldassare*, 250 F.3d at 194; *see also Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (noting that "[e]mployees of federal and state government do not relinquish their First Amendment rights to comment on matters of public interest as a condition of their government employment"). To establish the existence of this right, employees must show that: (1) they engaged in protected speech; (2) their speech was the motivating or substantial factor for the alleged retaliation; and (3) defendant employer must be unable to show, by a preponderance of the evidence, that the employer would have taken the same action even in the absence of the protected speech. *Baldassare*, 250 F.3d at 194-95. To determine if an employee engaged in protected speech, we apply two-part balancing test established by the

United States Supreme Court in *Pickering v. Board of Education*. 391 U.S. 563 (1968).

Under *Pickering*, speech is protected if the interests of the public employee "in commenting upon matters of public concern" outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. If the balance weighs in favor of the employer, the speech is unprotected. *See Azzaro v. County of Allegheny*, 110 F.3d 968, 980 (3d Cir. 1997) (en banc) (noting that speech is unprotected where the government's interest in "effective and efficient provision of services" outweighs the interest of the employee and the public in speaking). Matters of public concern are those that can "be fairly considered as relating to any matter of political, social or other concern to the community." *Green v .Philadelphia Hous. Auth.*, 105 F.3d 882, 885-86 (3d Cir. 1997). These issues are questions of law for the court, *Baldassare*, 250 F.3d at 195, and our analysis requires that we examine the "the content, form, and context of a given statement based upon the record as a whole." *Connick v. Myers*, 461 U.S. 138, 148 (1983).

Before we turn to the application of the *Pickering* test in this case, however, we must first address Ober's actions. In bypassing the chain of command and speaking to Hickes instead of Conley, Ober engaged in the type of communication traditionally considered speech for First Amendment retaliation purposes. Ober also made a decision, however, not to speak with Conley or any of his superiors in the chain of command. This failure to speak is not expressive conduct protected under the First Amendment. For the purposes of this case, however, we view Ober's silence and speech jointly and characterize Ober's claim as one

of retaliation for speaking outside the chain of command.

Under *Pickering*'s first step, there is little doubt that speech regarding alleged police corruption is a matter of public concern, particularly given the vital role state police play in promoting public safety and enforcing and upholding the laws. *See Baldassare*, 250 F.3d at 197 (stating that matters of public concern include "allegations of corrupt practices by government officials") (quoting *O'Donnell v. Yanchulis*, 875 F.2d 1059, 1061 (3d Cir. 1989)); *see also Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1271 (3d Cir. 1994). Therefore, Ober's communications with Hickes about the FBI investigation satisfy the first step of the *Pickering* balancing test. Turning to the second element of the *Pickering* test, we examine the context in which Ober spoke and the government's interest in regulating when and to whom he speaks.

Pickering's second prong requires "a fact-sensitive and deferential weighing of the government's legitimate interests" in regulating a public employee's speech. *Bd. Of County Comm'r v. Umbehr*, 518 U.S. 668, 677 (1996). Governmental interests underlying the regulation of employee speech may include "whether the statement impairs discipline by supervisors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Swartzwelder*, 297 F.3d at 235 (citing *Rankin v. McPherson*, 483 U.S.378, 388 (1987)). Courts have given law enforcement agencies wide latitude to regulate an employee's speech when that speech impacts on areas such as discipline, morale, harmony, uniformity, and trust in the ranks. *See Kelley v. Johnson*, 425 U.S. 238, 246 (1976) (noting that police

departments need significant flexibility to make decisions that affect "discipline, esprit de corps, and uniformity"); *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1293 (11th Cir. 2000) (recognizing the "heightened need for order, loyalty, morale, and harmony, which affords a police department more latitude in responding to the speech of its officers than other government employers"); *O'Donnell v.Barry*, 148 F.3d 1126, 1135 (D.C. Cir. 1998) (stating that due to the "special degree of trust and discipline required in a police force there may be a stronger governmental interest in regulating speech of police officers than in regulating the speech of other governmental employees"); *Campbell v. Towse*, 99 F.3d 820, 829-30 (7th Cir. 1996) (noting the special need of law enforcement superiors to be assured that their subordinates will be loyal and will carry out orders); *Moore v. Wynnewood*, 57 F.3d 924, 934 (10th Cir.1995) (finding that law enforcement has a "heightened interest" in maintaining discipline and harmony).

The facts at hand present precisely the type of situation in which latitude should be given to the state police. Ober did not simply speak about suspected corruption, when he spoke, he chose to speak to someone outside his chain of command. In doing so, Ober violated an established PSP regulation requiring PSP members to promptly report, to their superiors, any suspected wrongdoing by other members. These regulations are designed to promote efficiency and trust, to maintain order and discipline, and to effectively alert superiors to potential problems or wrongdoing. The need to enforce compliance with these regulations in this case far outweighs Ober's interest in violating them. Ober fails to present a persuasive reason for circumventing the chain of command by speaking with Hickes instead of Major Conley. While it is possible that bypassing the

chain of command might be justified if an officer's superiors were reasonably suspected of wrongdoing, nothing in Ober's conversation with Kush or elsewhere in the record suggests that Conley, Conley's superiors, or Commissioner Evanko were involved in Stanton's scheme or could not be trusted. Ober was required by regulation to report his conversation to his supervisor; his decision to go outside of the appropriate hierarchy is not a constitutionally protected free speech right given the strong governmental interest in having that regulation followed.

Under *Pickering*, the balance of interests in the instant case clearly favors the State. Appellee Ober fails to show that his interests in communicating about the investigation outside the chain of command outweigh the State's interest in maintaining order, trust, discipline and efficient communication. Therefore, Ober did not engage in protected speech and, consequently, fails to satisfy the first element of a First Amendment retaliation claim. Because Ober cannot show he had a constitutional right to bypass the chain of command, there is no need to decide whether Appellants are entitled to qualified immunity. Therefore, we reverse the District Court's denial of Appellants' motion for summary judgment.

V.

For the aforementioned reasons, we will reverse the District Court's denial of Appellants' motion for summary judgment and remand the case to the District Court for action consistent with this Opinion.

TO THE CLERK:
Please file the foregoing Opinion

By the Court:
/s/ Joseph E. Irenas

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

DARRELL G. OBER,	:
Plaintiff	:
	:
vs.	: **l:CV-Ol-OO84**
	:
PAUL EVANKO	:
MARK CAMPBELL	:
THOMAS COURY,	:**(JUDGE CALDWELL)**
JOSEPH WESTCOTT	:
HAWTHORNE CONLEY	:
Defendants	:

MEMORANDUM

I.) Introduction.

Plaintiff, Darrell G. Ober, a captain with the Pennsylvania State Police ("PSP"), filed this civil rights action, Principally alleging violations of his First and Fourth Amendment rights. Defendants are Paul Evanko, the Commissioner of the PSP; Thomas Coury and Hawthorne Conley, PSP Deputy Commissioners; Joseph Westcott, formerly PSP Deputy Commissioner; and Mark Campbell, formerly assistant chief of staff to the former Governor of Pennsylvania, Thomas Ridge. Before us are cross-motions for summary judgment. The claims at issue are: (1) the First Amendment claim, based on allegedly retaliatory conduct for Plaintiff's handling of an FBI probe involving the PSP; (2) a related conspiracy claim that Defendants conspired to retaliate against Plaintiff for exercising his First

Amendment rights; and (3) the Fourth Amendment claim that Plaintiff was seized when he submitted to questioning for the purpose of an administrative inquiry into his handling of the FBI matter.

For the reasons discussed below, we will deny Plaintiff's motion for summary judgment and grant in part Defendants' motion for summary judgment.

II.) Standard of Review.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In reviewing the evidence, facts and inferences must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S.574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 553 (1986).Summary judgment must be entered in favor of the moving party"[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Id. at 586-87, 106 S.Ct. at 1356, 89 L.Ed.2d at 552 (citations omitted). The moving party bears the initial responsibility of stating the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323, 106 S. Ct. at 2253, 91 L.Ed.2d at 274. It can discharge that burden by "showing that there is an absence of evidence to support the nonmoving party's case." Id. at 325, 106 S.Ct. at 2253-54, 91 L.Ed.2d at275.

An issue is "genuine" "only if a reasonable jury, considering the evidence presented, could find for the non-moving party." Childers v. Joseph, 842 F.2d 689, 693-94 (3d Cir. 1988)at 1356, 89 L.Ed.2d at 552 (citations omitted). The nonmoving(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A fact is "material" when it would affect the outcome of the trial under the governing law. Anderson, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211. When a moving party has carried his or her burden under Rule 56, the burden shifts to the nonmoving party to demonstrate that an issue of material fact exists. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586-87, 106 S.Ct. party "must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment," and cannot simply reassert factually unsupported allegations contained in [the] pleadings." Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989) (citation omitted). "If the [nonmoving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50, 106 S.Ct. at 2511, 91 L.Ed.2d at 212 (citations omitted). Factual averments in briefs do not satisfy the nonmoving party's burden. Harter v. GAP Corporation, 967 F.2d 846, 852 (3d Cir. 1992) (brackets added).

These same standards apply to cross-motions for summary judgment, and we consider such cross-motions separately. The filing of cross-motions is not a concession by either party that summary adjudication is appropriate. Transportes Ferreos deVenezuela II CA v. NKK Corp., 239 F.3d 555, 560 (3d Cir. 2001).

III. Background.

For the purpose of summary judgment, the following is the background to this litigation. On July 20, 1981, Plaintiff enlisted as a cadet with the PSP, and on December 5, 1981, he became a PSP trooper. (Ober Dep.at p. 16). Over the years, he was promoted to the ranks of corporal, sergeant, lieutenant, and finally captain on March 3,1995. In 1998, he became the director of the internal affairs division ("IAD") of the bureau of professional responsibility "BPR"). (Id. at p. 22). As director of the IAD, he was in charge of assigning investigations and routing the completed investigations to the proper authority. (Id. at p. 47). On April 26, 1999, Ober was temporarily transferred from IAD to the bureau of technology as a team leader to assist with the Incident Information Management System ("IIMS") project. (Id. at pp. 22- 23). Plaintiff and Col. Evanko had an agreement which provided that Plaintiff would return to IAD when his work with IIMS was completed.

While director of IAD, Plaintiff was contacted by FBI special agent Ralph Kush in late September or early October 1998. (Id. at pp. 76-77; Kush Dep. at p. 95). Agent Kush informed Plaintiff that the FBI was conducting a political-corruption investigation into whether a political figure was taking payoffs from police academy applicants in exchange for admission into the academy. (Kush Dep. at pp. 10-11, 99-100). The two discussed how such a scheme could occur. Plaintiff maintains that during the conversation they concluded that this job-selling scheme could not be accomplished without help from someone within the state police force, and that only certain members of the force had access to the police academy examination process. (Ober Dep. at pp. 81, 85-86)

Plaintiff believed that although Agent Kush did not expressly tell him to keep the FBI investigation confidential, the two had a clear understanding they would do so. (Ober Dep. At pp. 105, 146-47). Consistent with Ober's assertion, Agent Kush testified that although he did not instruct Plaintiff to keep the information confidential, he had expected Ober to handle the sensitive information in the appropriate manner and had hoped that Ober would not discuss it with anyone. (Kush Dep. at p. 118).

Shortly after his telephone conversation with Kush, and believing that Lt. Col. Hickes, deputy commissioner of staff, would not be involved in the alleged corrupt activity, Plaintiff sought his guidance. (Ober Dep. at pp. 121, 131). Hickes told Plaintiff to keep him informed but not to discuss the matter with anyone else. (Ober Dep. at p. 150). Hickes was not in Ober's direct chain of command.

On May 12, 1999, after the FBI investigation ended, Plaintiff and Hickes informed Evanko of the FBI's investigation and the concern that high-ranking officials in the state police or in the governor's office might have been involved. (Evanko Dep. at pp. 42, 51). They also informed Evanko that while the investigation was unfounded as to higher-ups, the investigation did uncover the involvement of one PSP trooper. (Id. at p. 69). Evanko was embarrassed and upset for several reasons, including the decision to keep the information from him and that Hickes had become involved in another deputy commissioner's command. (Id. At pp. 44, 46-47).

After being informed of the FBI investigation, on May 12, 1999, Col. Evanko informed the governor's deputy chief of staff, Mark Campbell, of the situation. (Evanko Dep. at p. 64). Col. Evanko also informed Campbell that an administrative inquiry would be

conducted by the State Police. (Id. at pp. 69, 113-14). Evanko notified Campbell as a courtesy. (Id. at pp. 68-69). Campbell did not authorize or approve the administrative investigation. (Campbell Dep. at pp. 30-34) Evanko assigned Majors Thomas Williams and Robert Werts to conduct the inquiry. (Evanko Dep. at pp. 179-83). Its purpose was to identify the facts involved with (1) the FBI contact with Ober; (2) Ober's conversation with Hickes; and (3) the decision to keep the FBI investigation confidential. (Id). The inquiry was not an official investigation by BPR. (Id at 183). It was completed by July 21, 1999, and neither Ober nor Hickes was disciplined. (Id. at p. 184)

In the course of the administrative inquiry, the Majors interviewed the plaintiff and at least five others. At his interview in June 1999, Plaintiff was given his Garrity[1] warning.

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[1]Garritv v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). (Ober Dep., 12/5/01, at p. 132), but no Miranda warnings. (Id. At p. 134). The Garrity warning is given when there is not going to be a criminal investigation. (Id. at p.132). Plaintiff was not told whether he could leave the interview or not, and he kept his firearm. (Id. at p. 149).

In a letter dated May 22, 1999, retired Colonel Philip Conti notified Col. Coury of possible off-duty misconduct by Ober. (See Ex. 10, attached to Ober's Dep.). The allegation was that Ober had improperly solicited historic artifacts from the widow of a state police retiree. (Id). In a subsequent letter dated July 9, 1999, Conti notified Col. Coury of a similar incident involving Ober. (Id.). Pursuant to PSP administrative regulation 4-25, Col. Coury forwarded the information to the BPR, which initiated an inquiry. The allegations against Ober were deemed unfounded. (Id. Ex. 11).

Plaintiff maintains that this investigation into his personal affairs was conducted in retaliation for his involvement in the FBI investigation. (Ober Dep. at p. 254). On August 20, 1999, Col. Evanko informed the head of the PSP centennial book committee that Plaintiff could no longer volunteer with the committee because the IIMS project required Plaintiff's full attention. (Id. at pp. 287-88). A few days later, on August 23, 1999, while temporarily assigned to the bureau of technology, Plaintiff was asked to turn in the BPR's cellular telephone he had been using. (See id. at pp. 297, 299-300; Conley Dep. at pp. 77-80).

About this same time, Plaintiff made inquiries into the location of a retired policeman's letter of commendation. (Ober Dep. at pp. 301-02). Conley notified Plaintiff that he owed $69 to the Commonwealth for the cost of framing the letter, which had been done months earlier at Plaintiff's direction. (Id. at pp 304, 305). Plaintiff then paid Conley the $69 in exchange for the release of the letter. (Id. at p. 307). Plaintiff filed a grievance in an effort to recoup the $69 but was unsuccessful. (Id. at p. 310).

Plaintiff also claims that he was improperly denied two educational opportunities. In the fall of 1999, Major Einsel denied Plaintiff's application to Northwestern University's police staff and command school. (Ober Dep. at p. 350). His application was denied because it was submitted past the deadline. (Id.). Also, Plaintiff complains that around April of 2000, he was denied the opportunity to attend a national alcohol symposium scheduled for June 2000. (Id. at pp. 355-60). That year, no state police employee attended the conference.

In early January 2000, Plaintiff was nearing the completion of his assignment with IIMS. Although Evanko and Plaintiff had agreed that Plaintiff would be

returned to the BPR upon the completion of his assignment with IIMS, (Evanko Dep. at pp. 214-15), Major Conley requested that Plaintiff not be returned to the BPR. (Id. at p. 219). On January 10, 2000, Plaintiff was notified that he was being transferred to Washington County to assist in the preparations for the National Governors' Association conference. (Id. at pp. 218-19). The transfer was for an indefinite duration and was about 200 miles from Harrisburg, where Ober was stationed.

In attempting to block his transfer, Plaintiff filed a petition for mandamus and a request for a preliminary injunction in the Pennsylvania Commonwealth Court. On January 27, 2000, Evanko agreed to rescind the transfer until the court ruled on the mandamus petition. In exchange, Ober withdrew the preliminary injunction motion. On February 19, 2000, Ober was assigned as the central section commander within the bureau of liquor control enforcement. This was typically a lieutenant's position, so Plaintiff considered it a demotion. Some three months later, when a position for a captain became available in the Harrisburg area, on May 30, 2000, Evanko assigned Plaintiff as the director of the administration division in the bureau of liquor control enforcement.2

2In the meantime, on March 30, 2000, the commonwealth court had dismissed Ober's petition for mandamus as moot because Evanko had filled the Washington, Pennsylvania, position and because Ober had been assigned as central section commander.

After Plaintiff was notified of Evanko's order transferring him to Washington County, Ober withdrew from a position with the Pennsylvania Emergency Management Agency (PEMA). (Ober Dep. at p. 278). However, when the transfer did not go through, Ober

requested that he return to PEMA. (Id. at pp. 283-284). His request was denied because Major Francis Koscelnak supposedly wanted Ober to concentrate on his new duties. (Id. At pp. 284, 289). In the summer of 2000, when Major Phillip DeWire replaced Major Koselnak, Plaintiff made a second request to return to PEMA which was denied. (Id. at pp. 292-95; DeWire Dep. at p.44). Plaintiff contends that Lt. Col. Westcott was ultimately responsible for denying his request. (Ober Dep. at p. 295). Plaintiff further contends that because he was not allowed to return to PEMA, he was denied opportunities for overtime. Finally, Plaintiff claims that Col. Coury blocked two opportunities for Plaintiff to be promoted to the rank of major. (Id. at p. 241). The first opportunity was an opening for the director of the BPR in late 1999 or early 2000 and the second was an opening for the director of the bureau of liquor control enforcement around July of 2000. (Id. at pp. 243-247).

IV. Discussion.

Initially, we dispense with two defense motions concerning some of Plaintiff's summary-judgment evidence: (1) Defendants' Motion to Strike Plaintiff's purported affidavits and other documents submitted in opposition to Defendants' motion for summary judgment; and (2) Defendants' Motion to Strike exhibits to Plaintiff's reply brief. We will dismiss these motions as moot because none of the challenged evidence was necessary to a determination of the cross-motions for summary judgment.

A. The First Amendment Retaliation Claim.

We first address Plaintiff's claim that Defendants retaliated against him in various ways for asserting his First Amendment right to free speech when he discussed

the FBI's investigation with Lt. Col Hickes rather than stay within his own chain of command.3 Specifically, Plaintiff asserts that the following actions were retaliatory: (1) the administrative investigation into his handling of the FBI investigation after Kush notified him of it; (2) the investigation into his personal collection of PSP memorabilia; (3) his removal from the PSP centennial book committee; (4) the recall of his cellular phone;

First Amendment retaliation claims are evaluated under a three-step process: (1) the plaintiff must show that he engaged in activity protected by the First Amendment; (2) the plaintiff must show that the protected activity was a substantial or motivating factor for the alleged retaliation; and (3) when the plaintiff establishes a substantial or motivating factor, the defendants may defeat the plaintiff's claim by showing that they would have taken the same actions in the absence of the protected conduct. Baldassare v. New Jersey, 250 F.3d 188, 195 (3d Cir. 2001) (citations omitted). The first step is a question of law for the court, while the second and third steps are normally questions of fact for the fact finder. Id. at 195.

3Prompted by our speculation in our memorandum dealing with Defendants' motion to dismiss, Plaintiff argues that he is entitled to summary judgment on additional First Amendment claims based on the right of association and the right to petition the government. (See P1's Supp. Br. at pp. 6-7). However, Plaintiff did not support these claims with citation to precedent, so Plaintiff will be denied summary judgment on those claims. In making this decision, we do not reach Defendants' argument that no such claims were set forth in the amended complaint.(5) denial of reimbursements; (6) denial of educational opportunities; (7) the attempted

transfer to Washington County; (8) a constructive demotion to a lieutenant's position; (9) denial of overtime opportunities when he was not reappointed to PEMA; and (10) the failure to promote him to the rank of major.

In moving for summary judgment, Defendants first argue that Plaintiff cannot satisfy the first step because his conduct was not activity protected by the First Amendment. They provide two reasons. First, "Ober's decision to ignore state police regulations [concerning chain of command mandates] and report the matter to Lieutenant Colonel Hickes was a matter of personal concern, rather than public, concern." (Defs' Supp. Br., at p. 4). Second, the government's interest in proper management of the PSP by investigating Ober outweighed any reason Plaintiff may have had for going outside his chain of command.

To qualify as protected activity, Plaintiff must satisfy the Pickering balancing test. Pickering v. Board of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). We weigh Plaintiff's free speech interest in commenting on a matter of public concern against the public employer's interest in promoting the efficiency of the public services it performs through its employees. Board of County Comm'rs v. Umbehr, 518 U.S. 668, 675- 676, 116 S.Ct. 2342, 2347-48, 135 L.Ed.2d 843, 852 (1996); Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811, 817 (1968). First, however, we must determine whether the speech in question involved a matter of public concern. Baldassare, 250 F.3d at 195 (citations omitted).

"`A public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community.'" Id. (quoting Green v. Philadelphia Housing. Auth., 105 F.3d 882, 885-86 (3d Cir. 1997))

(internal quotation marks omitted) . We look to the content, form, and context of the alleged protected speech.Id. (citations omitted)

In doing so, we reject Defendant's contention. As Plaintiff asserts, his conduct involved a matter of public concern because it dealt with "a political corruption investigation that included high officials." (Pl's Opp'n Br., at p. 8). The Third Circuit has established that "`allegations of corrupt practices by government officials are of the utmost public concern.'" Baldassare, 250 F.3d at 197 (quoting O'Donnell v. Yanchulis, 875 F.2d 1059, 1061 (3d Cir. 1989)); see also Swineford v. Snyder County Pa., 15 F.3d 1258, 1272. (3d Cir. 1994) ("speech disclosing public officials' misfeasance is protected"); McDonald v McCarthy, No. 89-319, 1990 WL 131393, at *7 (E.D. Pa. Sept. 7, 1990) ("It is a matter of public concern if a police officer's job is threatened because he investigates alleged illegal activity and brings to light potential wrongdoing by public officials.").

Defendants rely on the following assertions in maintaining that Plaintiff was not dealing with a matter of public concern: (1) Agent Kush did not instruct Plaintiff to keep the information confidential; (2) Plaintiff misrepresented his conversation with Agent Kush to Col. Hickes; (3) the FBI did not believe that Commissioner Evanko, his deputies, or anyone in the governor's office were involved in illegal activity; and (4) Plaintiff inappropriately discussed the investigation with Col. Hickes, who was outside his chain of command. These issues are irrelevant to whether the speech at issue here was a matter of public concern. Mindful of the content, form, and context of the speech, we believe it clearly dealt with attempts by Ober to assist in the investigation of alleged wrongdoing by public employees. We also note that Plaintiff contests

these assertions, and that they are therefore not undisputed facts. Because we have determined that Plaintiff's speech was on a matter of public concern, we proceed to the balancing of interests under Pickering. An employer's interests may outweigh the Plaintiff's interest where the speech causes disruption in the workplace. Swineford, 15 F.3d at 1272 (citations omitted). We must also consider whether Plaintiff "knowingly or recklessly made false statements and whether [the] speech was motivated by animus." Id.

The parties dispute whether any policy or regulation required Ober to report the FBI investigation to someone within his direct chain of command. In any event, we would find the balance tilts in favor of Plaintiff, especially since Defendants assert that Evanko and his chief deputies suffered only "unwarranted embarrassment" (Defs' Supp. Br., at p. 5). "Enforcement of the chain of command directive, requiring subordinates to report problems to immediate superiors, is a legitimate means of promoting efficiency. But [the PSP's] interest is outweighed by the public's interest in encouraging investigation of alleged wrongdoing." McDonald v. McCarthy, No 89-319, 1990 WL 131393, at *7 (E.D. Pa. Sept. 7, 1990) . "On the employee's side of this balance, the public's interest in exposing potential wrongdoing by public employees is especially powerful." Baldassare, 250 F.3d at 198. Therefore, we conclude that Plaintiff engaged in protected activity.

Defendants next argue that their conduct is not sufficient to constitute retaliatory conduct because none of it affected Plaintiff's terms or conditions of employment, having instead only intangible or indirect effects on Ober's employment status. They point out that during the relevant time Plaintiff's rank, salary and benefits remained unchanged. In support they cite, among other cases, Robinson v. City of Pittsburgh, 120

F.3d 1286 (3d Cir. 1997), Williams v. Bristol-Myers Squibb Co., 85 F.3d 270 (7th Cir. 1996), and Moore v. Grove North America, Inc., 927 F. Supp. 824 (M.D. Pa. 1996) (Caldwell, J.). We disagree. The cases cited dealt with employment- discrimination cases under statutes like Title VII and the ADA. They are not relevant here because the Third Circuit has a different standard for First Amendment retaliation claims. It is sufficient if "the allegedly retaliatory conduct" would "`deter a person of ordinary firmness' from exercising his First Amendment rights. . . ." Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000) (quoted case omitted). Under the standard, we think that the issue of retaliatory conduct is a question of fact in the instant case.

B. The Fourth Amendment Claim.

Plaintiff asserts that he was unlawfully seized in violation of the Fourth Amendment when he was subjected to an interview during the course of the inquiry into his handling of the FBI investigation.

Defendants have moved for summary judgment on this claim and we agree with their reasoning. In the context of a paramilitary organization like the state police, Plaintiff was not subjected to a custodial interrogation, as he asserts. Rather, he was interviewed in the course of an administrative inquiry, which does not violate the Fourth Amendment. See Driebel v. City of Milwaukee, - F .3d ___, 2002 WL 1734023 (7th Cir. 2002). In any event, there was no seizure here. Id.

C. Individual Liability.

Defendants also argue that there is no evidence that they individually violated Plaintiff's rights. We disagree except as to defendant Campbell, a former assistant chief of staff in the governor's office. His only connection to the case is that Evanko notified him that Evanko was going to investigate Ober's handling of the

FBI investigation. (We will also not dismiss the conspiracy claim against the remaining Defendants.)4

D. Qualified Immunity Defense.

Finally, we reject Defendants' claim that they are entitled to qualified immunity. Qualified immunity is an immunity from suit which provides that government officials who perform discretionary functions are shielded "`from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have

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4Plaintiff also alleges Defendants violated Plaintiff's right to be free of unlawful conspiracies in violation of Pennsylvania tort law. In a footnote to their supporting brief, Defendants argue that this claim is barred by sovereign immunity. (See Defs' Supp. Br., at p. 10 n.4). We agree and will grant Defendants summary judgment on this state-law claim. See Maute v. Frank, 441 Pa. Super. 401, 403, 657 A.2d 985, 986 (1995) (citing Borouoh of Jefferson v. Century III Assocs., 60 Pa. Commw. Ct. 94, 430 A.2d 1040 (1981), vacated on other grounds, 498 Pa. 57, 444 A.2d 665 (1989))violated.'" McLaughlin v. Watson, 271 F.3d 566, 570 (3d Cir. 2001), cert. denied, 122 S.CL. 1543 (2002) (quoting Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523, 530 (1987)). Plaintiff may defeat a claim of qualified immunity by alleging that the public officials violated a "`clearly established right.'" Id. at 570-71 (quoting Anderson, 483 U.S. at 638-39, 107 S.Ct. at 3038, 97 L.Ed.2d at 530). We must ask "whether a reasonable official in [a] defendant's position at the relevant time `could have believed, in light of clearly established law, that [his or her] conduct comported with established legal standards.'" Id. at 571 (quoting Merkle, supra, 211 F.3d at 797) (internal quotation marks omitted).

Because the law was clear at the time Defendants acted that a public employee cannot be subjected to retaliation for exercising his rights under the First Amendment, we reject Defendants' claim of qualified immunity. See Baldassare, 250 F.3d at 201.

We will issue an appropriate order.

William W. Caldwell